Supreme Court, U.S.
OCT 2 1992
OFFICE OF THE CLERK

No. 92-392

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL BASKETBALL ASSOCIATION,
Petitioner,

v.

CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP
and WGN CONTINENTAL BROADCASTING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE NATIONAL FOOTBALL LEAGUE AND THE NATIONAL HOCKEY LEAGUE AS AMICI CURIAE IN SUPPORT OF PETITIONER NATIONAL BASKETBALL ASSOCIATION

HERBERT DYM *
JEFFREY PASH
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

Attorneys for Amici Curiae National Football League and National Hockey League

October, 1992

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE PROPER APPLICATION OF SECTION 1 OF THE SHERMAN ACT TO SPORTS LEAGUE JOINT VENTURES HAS NOT BEEN, BUT SHOULD BE, ADDRESSED BY THIS COURT	5
II. INTERNAL ARRANGEMENTS PROMOTING THE ECONOMIC COMPETITIVENESS OF LEAGUES SHOULD NOT BE REVIEWED UNDER CONSPIRACY PRINCIPLES DEVELOPED IN WHOLLY UNRELATED BUSINESS CONTEXTS	6
A. Sports Leagues Are Economically Integrated Joint Ventures	6
B. The Conspiracy Principles of Section 1 Should Not Apply to Internal League Arrangements	8
C. In Any Event, Restrictions Ancillary to the Production and Sale of a League's Joint Product Should Be Found Lawful Under Section 1	10
III. THE RULE OF REASON ANALYSIS IN THE COURT OF APPEALS FAILED PROPERLY TO CONSIDER THE PROCOMPETITIVE EFFICIENCIES OF THE CHALLENGED LEAGUE PRACTICES	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES	Page
American Football League v. *National Football League*, 323 F.2d 124 (4th Cir. 1963)	9
American Tobacco Co. v. *United States*, 221 U.S. 106 (1911)	10
Broadcast Music, Inc. v. *Columbia Broadcasting System*, 441 U.S. 1 (1979)	8, 11
Cline v. *Frank Dairy Co.*, 274 U.S. 445 (1927)	10
Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984)	9
Levin v. *National Basketball Ass'n*, 385 F. Supp. 149 (S.D.N.Y. 1974)	6
Linseman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977)	6
Los Angeles Memorial Coliseum Com'n v. *National Football League*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 884 (1984)	2, 5, 6, 9, 11
Mid-South Grizzlies v. *National Football League*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984)	9
Morrison v. *Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986)	11
National Collegiate Athletic Ass'n v. *Board of Regents*, 468 U.S. 85 (1984)	12, 13
National Football League v. *North American Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of certiorari)	3, 11
Northwest Wholesale Stationers v. *Pacific Stationery & Printing*, 472 U.S. 284 (1985)	8
Philadelphia World Hockey Club, Inc. v. *Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972)	5
Radovich v. *National Football League*, 352 U.S. 445 (1957)	5
Rothery Storage & Van Co. v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987)	11
San Francisco Seals, Ltd. v. *National Hockey League*, 379 F. Supp. 966 (C.D. Cal. 1974)	6
Smith v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978)	3, 9

TABLE OF AUTHORITIES—Continued

Page

United States v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899) 10

United States v. *Joint Traffic Ass'n*, 171 U.S. 505 (1898) 10

United States v. *National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953) 7-8

United States Football League v. *National Football League*, 842 F.2d 1335 (2d Cir. 1988) 12

WTWV, Inc. v. *National Football League*, 678 F.2d 142 (11th Cir. 1982) 9

STATUTES AND LEGISLATIVE MATERIALS

Sherman Act
15 U.S.C. § 1 5

Professional Sports Antitrust Immunity: Hearings Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1985) 2

TREATISES AND LAW REVIEW ARTICLES

M. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications for the Consumer Welfare Model*, 82 Mich. L. Rev. 1 (1983) 8

W. Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. Econ. 1 (1964) 6

G. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. Rev. 219 (1984) 7, 9, 12

J. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 Duke L.J. 1013 8

J. Weistart & C. Lowell, *The Law of Sports* (1979 and 1987 Supp.) 10, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-392

NATIONAL BASKETBALL ASSOCIATION,
Petitioner,

v.

CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP and WGN CONTINENTAL BROADCASTING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE NATIONAL FOOTBALL LEAGUE AND THE NATIONAL HOCKEY LEAGUE AS AMICI CURIAE IN SUPPORT OF PETITIONER NATIONAL BASKETBALL ASSOCIATION

With written consent of petitioner and respondents, filed concurrently herewith, the National Football League and National Hockey League submit this brief as Amici Curiae in support of the Petition of the National Basketball Association for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

INTEREST OF AMICI CURIAE

Amici believe that review by this Court of the decision below is essential. In characterizing the National Basketball Association ("NBA") as a "cartel" (Pet. at 8a) and

the NBA member clubs as horizontal business competitors, the Court of Appeals utterly ignored the fundamental nature of sports leagues. The decision below is wrong as a matter of both law and economics.[1] If applied to amici's operations, it could seriously disrupt the operation of sports league joint ventures and ultimately may threaten the continued viability of a major American industry.

Absent clarification by this Court of the status of professional sports leagues under the antitrust laws, leagues and their member teams will be subjected to substantial uncertainty concerning even the most basic principles of league operations. Conducting postseason playoffs and even setting a schedule of games require league actions which are generally similar to those challenged in this case.

The decision below promises that sports leagues will face costly and debilitating litigation, and their ability to produce a high-quality entertainment product will be compromised. Accordingly, amici respectfully urge that the writ issue so that this Court may provide guidance on the proper application of Section 1 of the Sherman Act to the unique joint venture relationship that is at the heart of all professional sports leagues.

Amici also involve a significant amount of economic activity throughout the country. Television networks and advertisers, stadiums, and arenas benefit strongly from the success of professional teams. In addition, state and local governments take an active interest in sports fran-

[1] In the context of league control over franchise location, a similar misapplication led to an erroneous judgment in Los Angeles Memorial Coliseum Com'n v. National Football League, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 884 (1982). The Department of Justice has supported legislation that would overturn this decision. *See Professional Sports Antitrust Immunity: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 379-96 (1985) (prepared statement of Charles F. Rule, Acting Assistant Attorney General, Antitrust Division).

chises on behalf of the public. If permitted to remain the law, the opinion below therefore implicates not only the interests of amici, but also the interests of a wide variety of other businesses and sports fans throughout the country.

STATEMENT OF FACTS

The National Football League ("NFL") and National Hockey League ("NHL") are major professional sports leagues. Both operate in the United States; the NHL also has teams in Canada. The NFL presently consists of 28 teams which play their home games in 19 states and the District of Columbia. The NHL consists of 24 teams, 16 of which play their home games in 12 states and 8 of which play their home games in Canada. In many respects, the business operations of the NFL and NHL parallel those of petitioner.

In both the NHL and NFL, the member clubs of the league act jointly to coproduce and sell their football and hockey entertainment products. This extensive degree of integration is essential for a league successfully to produce and market its product and thereby compete with other entertainment products in a broad market. Such joint action is inherent in the very nature of a sports league, and neither the NFL nor the NHL—nor any other league—could exist otherwise. *National Football League* v. *North American Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of certiorari) ("*NASL*"); *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978). In recent years, however, federal courts have issued an array of confusing and contradictory opinions that have misapplied basic antitrust principles to invalidate league practices.

Both the NFL and the NHL produce professional sports entertainment of enormous interest to the American public. Recent surveys have shown that NFL football is America's most popular sport. Similarly, the popularity of NHL hockey has continuously increased in re-

cent years, to the point where fan interest in the NHL and professional hockey has reached an all-time high. Since 1990, the NHL has added three expansion teams. The 24 NHL franchises are now enjoying a period of growth, as reflected in a lucrative new cable television arrangement with ESPN, a major sports-cable network.

Like petitioner, the NFL and NHL each regulate the broadcasting of league games. These regulations, like those of the NBA, are designed to promote the competitiveness of the league venture by enhancing the attractiveness and marketability of the product. While these "restraints"—as is true with other league rules—necessarily limit the actions that an individual team can take, they advance the business interests of the enterprise as a whole and make it a more effective competitor in the entertainment market.

SUMMARY OF ARGUMENT

This Court has never defined the proper scope of application of the Sherman Act to professional sports leagues. Because such leagues are wholly unique enterprises, the absence of such guidance has caused lower courts to issue a series of confusing and erroneous rulings which have jeopardized procompetitive internal league business arrangements.

Any proper analysis of the status of sports leagues must recognize that internal arrangements relating to coproduction and sale of the league product are essential and lie outside the conspiracy provisions of the Sherman Act, which were developed in entirely different contexts. Such arrangements are fundamental to the nature of a sports league and are not anticompetitive within the meaning of the antitrust laws.

Even if the conspiracy rules of Section 1 apply to internal league operations, the court below erred in failing to apply the doctrine of ancillary restraints to the NBA's superstation rule. Further, in applying this

Court's decision in *NCAA* v. *Board of Regents* without regard to the substantial differences between sports leagues and a group of unintegrated colleges and universities, the Court of Appeals fundamentally distorted the application of the rule of reason in this case.

ARGUMENT

I. THE PROPER APPLICATION OF SECTION 1 OF THE SHERMAN ACT TO SPORTS LEAGUE JOINT VENTURES HAS NOT BEEN, BUT SHOULD BE, ADDRESSED BY THIS COURT.

While the question of whether the antitrust laws apply to sports leagues other than baseball has long been settled, *see, e.g., Radovich* v. *National Football League*, 352 U.S. 445 (1957); *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972), this Court has never undertaken to explain *how* the antitrust laws should be applied. As a result, the conspiracy principles of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1990), have been routinely applied to sports leagues in a manner that takes little or no account of their operations or of the business relationship between the member clubs.

Thus, notwithstanding the recognition that the member clubs of a league "are not true competitors, nor can they be," *Los Angeles Memorial Coliseum Com'n*, 726 F.2d at 1391, courts have continued to treat amici and other professional sports leagues as though they were nothing more than a collection of ordinary business competitors. Such an approach is wrong as a matter of both law and economics. It is fundamentally at odds with decisions of this Court explaining the proper application of the antitrust laws to joint ventures, and irreconcilable with the fundamental economic integration that characterizes a sports league's operations.

The misconception that the individual franchises of a sports league act as separate economic competitors con-

tinues to lead to doctrinal confusion and chaotic results in litigation.[2] Ironically, while courts have claimed to recognize the joint venture nature of sports leagues, they have failed to apply the antitrust rule of reason in light of that recognition. The decision below, like numerous other sports antitrust cases, assumes that individual member teams of a league—here, the Chicago Bulls—have a product of their own to sell in competition with the products of other member clubs. That assumption is simply wrong, and absent review by this Court, may continue to impact the application of the antitrust laws to sports leagues.

II. INTERNAL ARRANGEMENTS PROMOTING THE ECONOMIC COMPETITIVENESS OF LEAGUES SHOULD NOT BE REVIEWED UNDER CONSPIRACY PRINCIPLES DEVELOPED IN WHOLLY UNRELATED BUSINESS CONTEXTS.

A. Sports Leagues Are Economically Integrated Joint Ventures.

An individual sports franchise, standing alone, has no inherent economic value. W. Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. Econ. 1, 2-5 (1964). The attractiveness of a team, and hence its economic value, derives entirely from its membership in a league of similar franchises against whom it competes athletically and in conjunction with whom it *jointly* produces and sells an entertainment product.

---

[2] Some decisions have truly recognized the integrated nature of sports leagues and have therefore applied the antitrust laws appropriately. *See, e.g.*, San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974); Levin v. National Basketball Ass'n, 385 F. Supp. 149 (S.D.N.Y. 1974). Some have purported to do so while nonetheless treating individual league members as horizontal competitors. *See, e.g.*, Los Angeles Memorial Coliseum Com'n, 726 F.2d at 1391. Some have improperly treated league actions as *per se* illegal restraints between competitors. *See, e.g.*, Linseman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977).

Simply put, no sports team has anything to sell on its own. The Washington Capitals cannot themselves produce even a single hockey game. Instead, the Capitals must coproduce games within the NHL structure with other league members such as the Boston Bruins, Edmonton Oilers, and Los Angeles Kings. And even Washington football fans would soon tire of watching intrasquad scrimmages between the offensive and defensive teams of the Redskins. Instead, it is the games between the Redskins and other NFL clubs that fill RFK Stadium on autumn afternoons.

Because the teams jointly produce the only product they sell, it necessarily follows that an individual club's financial success is entirely dependent on the success of the league venture as a whole. Substantial broadcast and cable revenues and full stadiums and arenas benefit all member clubs. Even revenue that appears to be entirely "local" in character (such as from concessions) ultimately is earned only because of a franchise's league affiliation. G. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. Rev. 219, 227 n.22 (1984) ("*Intraleague Rivalry*").

Almost none of the arrangements that characterize sports leagues could exist among true economic competitors. The "free market" alternative to a league is barnstorming, where each team separately negotiates its schedule of opponents, playing sites, and the like. Experience has proven that there is little consumer interest in such an arrangement, and leagues developed as the only viable alternative. It is clear that individual franchises cannot act as business competitors among themselves, since to do so would inevitably destroy the enterprise in which they participate.[3]

[3] One of the first cases to consider the application of the antitrust laws to professional sports unequivocally recognized this principle. In United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953), Judge Grim wrote that "[i]f all the teams should

Past and current practice demonstrate that league franchises are thoroughly interdependent in almost every aspect of their businesses. Leagues negotiate common television and licensing arrangements, distribute teams on a basis that promotes geographic diversity and strong rivalries, and jointly create new "expansion" teams to serve additional consumers and strengthen the overall competitiveness of the league venture. Business competitors do not normally join together to create new competitors. Indeed, studies indicate that there is little meaningful economic competition between franchises in the same league, even when located in the same geographic area. J. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 Duke L.J. 1013, 1030, n.54.

B. The Conspiracy Principles of Section 1 Should Not Apply to Internal League Arrangements.

Earlier decisions of this Court have conclusively established that the antitrust laws must not be applied in a way that frustrates joint conduct resulting in economic efficiencies or that creates new products and services. *Broadcast Music, Inc.* v. *Columbia Broadcasting System*, 441 U.S. 1 (1979); *Northwest Wholesale Stationers* v. *Pacific Stationery & Printing*, 472 U.S. 284 (1985).

---

compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league . . . would fail, because without a league no team can operate profitably." *Id.* at 323.

The fate of the now-defunct All-America Football Conference proves the point. The league failed largely because of the "near-total" domination of the Cleveland Browns. When this domination became apparent, attendance dropped from a high average of 70,000 spectators to a low of 20,000 over four years, whereupon the league folded. M. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications for the Consumer Welfare Model*, 82 Mich. L. Rev. 1, 24 (1983).

Lower courts, however, have largely ignored these distinctions in the unique context of sports league joint ventures.

The decision below is a sharp step backwards in antitrust jurisprudence. While purporting to acknowledge that the NBA is a lawful joint venture, Pet. at 9a, the Court of Appeals nonetheless adopted the District Court's finding that the NBA is a cartel in selling its product. Id. at 15a. As one commentator correctly noted, such an approach is "schizophrenic".

> Thus, what the courts give with one hand by not declaring leagues per se illegal as cartels, they take back with the other by treating league activity under the rule of reason as if it were the conduct of a cartel. This schizophrenic approach has resulted in decisions that are inconsistent, contrary to basic antitrust goals, and unable to provide guidance for sports leagues as to what they may and may not do lawfully.

G. Roberts, *Intraleague Rivalry, supra*, at 240.[4]

Proper application of the antitrust laws to league operations must begin by recognizing the interrelationship of the individual franchises. Thus, under this Court's opinion in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), the cooperative nature of a league should place its internal business decisions outside the scope of Section 1 of the Sherman Act. Concerted activity within the meaning of the antitrust laws

---

[4] Insofar as the Seventh Circuit regarded the NBA as a cartel, its holding is inconsistent with those of other courts to consider the league relationship, each of which has at least acknowledged that sports leagues are lawful joint ventures. *See, e.g.*, Los Angeles Memorial Coliseum Com'n, 726 F.2d at 1391; Mid-South Grizzlies v. National Football League, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); WTWV, Inc. v. National Football League, 678 F.2d 142 (11th Cir. 1982); Smith v. Pro Football, Inc., 593 F.2d at 1178-79; American Football League v. National Football League, 323 F.2d 124 (4th Cir. 1963).

presupposes that "two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." 467 U.S. at 769. Because no individual sports franchise can pursue interests independent from its coventurers, joint league action in the production and sale of its common product does not implicate the competitive concerns inherent in Section 1 analysis.[5] This reality underscores the error in the District Court's finding that the Bulls can "[seek] the right to compete independently of the league for profits of their own." Pet. at 51a.

C. In Any Event, Restrictions Ancillary to the Production and Sale of a League's Joint Product Should Be Found Lawful Under Section 1.

Even if internal operating decisions of a sports league are not regarded as altogether outside the scope of Section 1, such arrangements should nonetheless be properly analyzed—and held lawful—under the doctrine of ancillary restraints.[6] The decision below simply ignores

---

[5] The leading academic treatise on sports law made the same argument even before the decision in *Copperweld*.

> Since a league's member-clubs do not compete with one another, it seems inappropriate to make them subject to legal principles designed to control the behavior of firms which are different. In its basic nature, a league-firm is not a conspiracy. To treat it as such is to force results which are unlikely to achieve any purpose intended by Congress.

J. Weistart & C. Lowell, *The Law of Sports* § 5.12, at 757-58 (1979).

[6] The common law ancillary restraint doctrine was first articulated by then Judge Taft in United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899). It has been recognized by this Court in many cases, including Cline v. Frank Dairy Co., 274 U.S. 445 (1927); American Tobacco Co. v. United States, 221 U.S. 106 (1911); and United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898). The doctrine holds that restraints that are reasonably ancillary to a pro-competitive enterprise are lawful, even if competition is incidentally reduced in the process. *Addyston Pipe*, 85 F. at 290.

well-reasoned opinions of other appellate courts which have strongly reaffirmed that such ancillary restraints further the economic goals of the antitrust laws rather than thwart them. *Morrison* v. *Murray Biscuit Co.*, 797 F.2d 1430, 1437 (7th Cir. 1986); *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert denied*, 479 U.S. 1033 (1987).

The NHL and NFL provide a product which, but for the leagues, "would not exist at all". *Broadcast Music*, 441 U.S. at 19. *See also NASL*, 459 U.S. at 1077. ("NFL football is a different product from what the NFL teams could offer independently . . . .") And there is "no reason to doubt" that the agreement to form a league and jointly produce this unique product is lawful. *Los Angeles Memorial Coliseum Com'n*, 726 F.2d at 1395. League decisions, such as the television restrictions at issue in this case, play an integral role in marketing the league's product. Limitations on the rights of local teams to market game telecasts are necessary to promote effectively the collective league interest in selling national television rights. Such restraints are plainly ancillary to the lawful agreement to form a league and jointly produce and sell an entertainment product.

As then-Justice Rehnquist recognized, this conclusion is particularly appropriate where, as here, the restraint strengthens the league's product in competition with other entertainment options. "It simply does not appear that the positive effects of the challenged restraint in helping the NFL to compete in the economic market place are outweighed by their negative effects on competition." *NASL*, 459 U.S. at 1080.

In sum, internal arrangements relating to the coproduction and sale of a league's product promote the competitiveness of the business, and fall outside the scope of Section 1.[7] Any extension of the doctrine set forth by

[7] Amici do not contend that *all* actions of a league lie outside the bounds of antitrust scrutiny, but rather that agreements between

the Court of Appeals inevitably will harm the competitiveness of such ventures and ultimately work to decrease consumer welfare.

III. THE RULE OF REASON ANALYSIS IN THE COURT OF APPEALS FAILED PROPERLY TO CONSIDER THE PROCOMPETITIVE EFFICIENCIES OF THE CHALLENGED LEAGUE PRACTICES.

The Court of Appeals also fundamentally misinterpreted the nature of the sports joint venture in its analysis under the rule of reason. By equating consumer welfare solely with the volume of games telecast, the opinion below ran counter to this Court's holding in *National Collegiate Athletic Association* v. *Board of Regents*, 468 U.S. 85 (1984) ("*NCAA*"), and failed to properly balance offsetting economic efficiencies.

While recognizing that *NCAA* "requires consideration of the . . . justifications for the [challenged] restraints," 468 U.S. at 103, the Court of Appeals examined the NBA's justifications in the this lawsuit as *if* they had been offered by the NCAA.[8] Because professional leagues are not similarly situated to college teams,[9] the reasoning of the court

---

individual franchises related to the production and sale of the joint venture product must do. Theoretically, agreements between a league and other economic actors could fall within the ambit of Section 1 of the Sherman Act. In addition, the monopolization provisions of Section 2 are not generally encompassed in the argument amici make here. *See, e.g.*, United States Football League v. National Football League, 842 F.2d 1335 (2d Cir. 1988).

[8] Judge Easterbrook wrote "The NCAA argued that restrictions . . . help[ed] to produce balanced competition on the field . . . to the benefit of fans . . . The Supreme Court found the argument unpersuasive. It is hard to see how similar balance arguments by professional leagues . . . could be more compelling." Pet. at 16a.

[9] College football teams do not produce an indivisible season of related games. G. Roberts, *Intraleague Rivalry*, at 245-46. Further, NCAA members compete in several different areas other than foot-

below ignores crucial procompetitive distinctions offered by the NBA. If left standing by this Court, the lower courts in the future may continue to apply *NCAA* in a way that virtually ensures a distorted application of the rule of reason to sports leagues.

The holding in *NCAA* is premised on the competing economic interests of college football teams. 468 U.S. at 99. ("The NCAA is an association of schools which compete against each other to attract television revenues.") By contrast, the NHL and NFL cooperate in all phases of the production and sale of their respective joint products. Marketing restrictions imposed by professional leagues inevitably are designed to further the economic competitiveness of their joint venture as a whole. And since a professional team's "games" are not its alone to sell, every professional franchise has an economic interest in the success of every other franchise in its league. When a restraint promotes the joint economic interests of the league, no single franchise is disproportionately disadvantaged, and all share equally in the resulting gains. None could receive any gain outside the league. By contrast, the restrictions at issue in *NCAA* were found to depress output, raise prices, and disadvantage individual competitors.

Any application of the rule of reason which takes this Court's command in *NCAA* seriously must consider the substantial arguments suggesting that sports league limitations such as the ones at issue in this case ultimately promote consumer welfare rather than inhibit it. A fair application of the rule of reason to the challenged television practices will find them entirely reasonable and lawful under the Sherman Act.

---

ball, they do not share revenue, and they do not require membership in the organization to produce 'college football'. J. Weistart & C. Lowell, The Law of Sports § 5.10, 1987 Supp. at 128.

CONCLUSION

The decision of the Court of Appeals in this case relied on fundamental misconceptions of the nature of professional sports enterprises and the proper modes of analysis for considering their status under the antitrust laws. In order to correct these misconceptions and provide definitive guidance to the federal courts in future matters, the writ should issue.

Respectfully submitted,

HERBERT DYM *
JEFFREY PASH
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

Attorneys for Amici Curiae National Football League and National Hockey League

October, 1992

* *Counsel of Record*